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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves (1) that this appeal be dismissed on the ground that it does not present a substantial federal question or (2) that the judgment of the New York State Court of Appeals sought to be appealed from be affirmed.

Statement

This case involves an appeal from a judgment (Appellant's Appendix pp. 29a-30a) of the Court of Appeals of the State of

New York which upheld an order by appellee Public Service Commission of the State of New York (Commission) restricting the use of utility bill inserts (leaflets enclosed with utility bills). The order prohibits utilities, including appellant Consolidated Edison Company of New York, Inc. (Consolidated Edison) from using bill inserts to disseminate messages espousing the position of utility managements on controversial matters of public policy.

The Commission's bill insert order was the culmination of its investigation of a complaint filed against Consolidated Edison by the Natural Resources Defense Council, Inc., *et al.* (NRDC). The NRDC objected to a Consolidated Edison bill insert discussing the need for nuclear power development. The complaint asked the Commission to ban the use of bill inserts for purposes of political advertising and, in addition, provide remedial relief to the complainants that would allow them to enclose a supplement in a future monthly billing presenting their views on nuclear power. The Commission concluded that the billing mechanism was an improper forum for use by utility management to express its views on controversial issues. The Commission stated (Appellant's Appendix p. 43a):

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's viewpoint on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy.

When denying rehearing, the Commission discussed its rationale in greater detail (Appellant's Appendix pp. 64a-68a). It noted that the billing mechanism provided a unique means by which management may get its views in the hands of the ratepayers and that this conferred an undue advantage on management. Further, it noted the spacial limitations of the bill insert. The limitations, the Commission concluded, argued for restricting the use of bill inserts (Appellant's Appendix p. 66a) ". . . to convey information that is clearly helpful to consumers, such as practical steps that individuals can take to conserve energy. . . ." Finally, the Commission addressed the Constitutional free speech aspect of its ruling, stating (Appellant's Appendix p. 67a):

> . . . [I]t does not contravene the utilities' rights of free speech or press. Utility bill inserts are not newspapers which, in principle, any person is free to publish and thereby make his opinions known to the public. The privilege to disseminate utility bill inserts derives from the privilege of franchised monopoly, conferred by the government. It can, therefore, be regulated by the government to assure that it is exercised in the public interest.
>
> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to

purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

The goal of free speech and of a free press is a well-informed electorate capable of making sound public policy decisions. Our ruling does not diminish to any substantial degree the utilities' ability to contribute to that goal. It does, however, preclude their monopolizing the unique utility bill insert medium.[1]

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[1] We note also that where the ratepayer's bill is accompanied by political advertisement, the political material is, absent allocation, getting a free ride; the utility is deriving the economic benefit of postage, envelope, labor and overhead involved in the billing process. And even if an allocation of the expenses could be made, the actual cost of enclosing such material in the bill itself does not approach the one-sided benefit to the management of being able to use the unique billing process in presenting its side of the controversy. It is certainly questionable whether ratepayers should be compelled to support views with which they do not agree. See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

As a final matter, the Commission considered (Appellant's Appendix p. 68a) the question of whether its standard of "controversial matters of public policy" was too vague. It decided that it was not, but did agree to provide prompt advisory rulings, if requested, on whether specific subjects came within its ban.

Consolidated Edison thereafter commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules to review the Commission's determination. The litigation concluded in a judgment by the New York Court of Appeals upholding the Commission (Appellant's Appendix pp. 29a-30a). In its decision (Appellant's Appendix pp. 1a-15a), the Court of Appeals found first that the Commission had adequate statutory authority for its order and then held that the order was not barred by the First Amendment.

Prior to Consolidated Edison's state court proceeding, Long Island Lighting Company had commenced a suit to challenge the Commission's order in the Eastern District of New York. That case, *Long Island Lighting Company v. Public Service Commission* (77 Civ. 972), has been decided by District Judge George C. Pratt. By Judgment dated March 30, 1979 Judge Pratt granted the Commission a declaratory judgment that its bill insert order ". . . does not infringe plaintiff LONG ISLAND LIGHTING COMPANY's rights under the first and fourteenth amendments to the United States Constitution." A copy of the portion of Judge Pratt's decision dated March 30, 1979 dealing with the Commission's bill insert order is appended to this Motion. The case is now on appeal to the United States Court of Appeals for the Second Circuit.

ARGUMENT

Consolidated Edison argues (Jurisdictional Statement pp. 9-29), as it did in the Courts below, abstract principles of constitutional law and ignores the circumstances of this case, circumstances which fully justify the conclusion of both the New York Court of Appeals and Judge Pratt that the Commission's order is a permissible regulation of Consolidated Edison's free speech. The ban is in accord with decisions of this Court and raises no issues requiring plenary examination.

I. The Commission's Bill Insert Regulation Is A Permissible Restriction Of Consolidated Edison's Speech.

A. The Regulation Is A Subject Matter Restriction Frequently Permitted By This Court.

The New York Court of Appeals considered the Commission's order to be closely akin to a traditional time, place and manner restriction frequently permitted by this Court.

See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976) where the Court noted that: ". . . [w]e have often approved restrictions of that kind [time, place and manner] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. . . ." [Citations omitted].[1]

The New York Court of Appeals concluded that the Commission's ban met the tests required for a time, place and manner restriction. It found (Appellant's Appendix pp. 9a-11a) that (1). ". . . there is no doubt but that the regulation leaves open numerous alternative means of communication . . ."; (2). ". . . the ban unquestionably fosters an important governmental interest . . ." and; (3). ". . . that the regulation, properly viewed, is not content orientated . . ."

The Court realized that the ban was defined by reference to the subject matter of bill inserts, *i.e.*, controversial matters of public policy, however, it found:

[1] This Court has approved a similar test in *United States v. O'Brien,* 391 U.S. 367, 377 (1968), where it upheld O'Brien's conviction for burning his draft card:

> . . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest . . ..

Here as in *O'Brien,* the Commission's prohibition relates to both speech and non-speech elements. The Commission is only secondarily concerned with the subject matter of Consolidated Edison's communications; the focus of the Commission's concern is primarily the means used to accomplish it.

> . . . [I]t does not discriminate against persons of any particular political stripe or prohibit the expression of any one position on a hotly debated issue. In short, the restriction endeavors, in an objective and evenhanded manner, to limit billing insert materials to the innocuous and noncontroversial. Given these circumstances, where the communication intrudes upon the privacy of the home, such a limitation does not offend the First Amendment (*Erznoznik v. City of Jacksonville,* 422 US 205, 209; see *Greer v. Spock,* 424 US 828, 838-839; *Lehman v. City of Shaker Heights,* 418 US 298, 302-304; see, Tribe, American Constitutional Law, § 12-21, at pp. 690-691, & n 21).

In a similar vein, Judge Pratt also concluded (Appellee's Appendix pp. 31-40) that the Commission's ban was akin to a time, place and manner restriction, finding that it leaves open ample alternative channels of communication and fulfills important governmental interests. Judge Pratt gave considerable attention to the "contents" aspect of the Commission's order. In a lengthy analysis of this Court's decision in *Lehman v. City of Shaker Heights,* 418 U.S. 298 (1974), Judge Pratt noted that the Court had upheld a content-based restriction when allowing the City of Shaker Heights to refuse political advertising in vehicles of the city transit system. He concluded that there were even more reasons in the present case for a ban than there were for the one upheld by this Court in *Lehman.*

We believe that the ban is, in the traditional sense of the terms, neither content-neutral nor content-based. Rather, the regulation is a subject matter restriction unrelated to any attempt by the Commission to foster or deter a particular point of view.[2]

[2] For an extended discussion of cases involving subject matter restrictions, *see "Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions,* 46 Chic. L. Rev. 81 (1978)".

The neutrality of the Commission's ban distinguishes it from cases where the government has attempted to foster or suppress a specific point of view or particular information. (*See, e.g., Miller v. California,* 413 U.S. 15 (1973) (banning obscenity); *Dennis v. United States,* 341 U.S. 494 (1951) (forbidding advocacy of violent overthrow of the government); *Landmark Communications v. Virginia,* 435 U.S. 829 (1978) (disclosure or publication of specified information)).

Subject matter restrictions have been upheld by this Court where necessary to achieve important state interests. A foremost example is *Lehman v. City of Shaker Heights, supra.* Other examples include *Greer v. Spock,* 424 U.S. 828 (1976) (involving a ban on political campaigning on a military base) *Young v. American Mini Theaters, Inc.,* 427 U.S. 50 (1976) (upholding Detroit's zoning ordinance limiting density of theaters showing sexually explicit but not obscene films), and *Rowan v. United States Post Office Dept.,* 397 U.S. 728 (1970) (upholding a statute permitting mail recipients to refuse lewd or offensive materials through the mail). The Commission's ban should similarly be upheld especially since it poses only a minimal burden on Consolidated Edison's speech and fulfills important governmental interests.

Consolidated Edison argues (Jurisdictional Statement pp. 14-18) that the Court of Appeals erred in concluding that the bill insert ban is not content based. After discussing cases involving time, place and manner restrictions, Consolidated Edison argues that under the approach of the New York Court of Appeals (Jurisdictional Statement p. 16) ". . .the State may suppress debate on all public issues, so long as the prohibition is applied in an 'evenhanded manner'. . . ." Of course, that argument has no relationship to this case where the utility's management may exercise its right to speak out on controversial issues in fora other than bill inserts. Consolidated Edison's argument is totally belied by the very nature of the Commission's bill insert ban. There simply has been no attempt on the part of the Commission to suppress free speech by utilities.

Consolidated Edison's only attempt to distinguish this Court's decisions upholding subject matter restrictions (Jurisdictional Statement p. 16, footnote 12) (Consolidated Edison mentions only two, *Greer, supra,* and *Lehman, supra*) is that the speakers in those cases were attempting to obtain access to the government's property to exercise free speech rights while, in this case, the Commission's order prevents the use by Consolidated Edison of its own property for First Amendment purposes. This Court drew no public property—private property distinction in its decisions in *Greer* and *Lehman*. Nevertheless, as we discuss below, the issue in this case is not the prevention of the use of Consolidated Edison's property but, rather, the use to be made of the utility billing process which the ratepayers are required to support. Consolidated Edison's discussion of the subject matter restriction cases (Jurisdictional Statement pp. 16-17) amounts more to a recitation of law review articles critical of this Court's decisions than an argument that the decisions are inapplicable to the case at hand and failed to support the decision of the court below. Consolidated Edison has not shown that the Court of Appeals, insofar as it concluded that the Commission's ban was a permissible subject matter restriction, was incorrect. To the contrary, the prior decisions of this Court demonstrate the correctness of the Court of Appeal's conclusion.[3]

[3] As a final thought, Consolidated Edison also argues (Jurisdictional Statement p. 18) that the Court of Appeals was incorrect in concluding that the Commission's ban did not prohibit expression of only one position on hotly debated issues. The company notes that the ban applies to the

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B. The Order Imposes Only A Minimal Burden On Consolidated Edison.

The Commission's ban relates to only one form of communication—bill inserts (messages enclosed with service bills). Consolidated Edison and all other utilities are not prohibited from using alternative means of communication. The Commission stressed (Appellant's Appendix p. 67a):

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. . . .

There can be no question that the New York Court of Appeals and Judge Pratt were correct in concluding that the ban leaves open ample alternative channels for communication.

The Court of Appeals' decision, concluding that there are ample alternative channels for communication, is in no way in conflict with this Court's determination in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). That case involved the placement of "for sale" signs in front of residential property. The Court determined that the ban-

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dissemination of the "utility's position" on controversial matters of public policy. This argument, of course, completely misses the point. The prohibition is addressed to the use of bill inserts by utility management since those are the only parties who would otherwise be able to use the billing process to disseminate their positions. It is disingenuous for Consolidated Edison to argue that the Commission's ban is unevenhandedly applied since the company has refused to allow other parties to use the billing process to disseminate their views. In fact, the company's refusal to allow the NRDC and other antinuclear proponents to use the billing mechanism prompted the complaint which led to the Commission's investigation resulting in its order to ban bill inserts.

ning of the "for sale" signs did not fulfill the governmental interest sought to be advanced by the ordinance, *i.e.*, stabilization of racially integrated housing. It found, however, that the ordinance would impede the ability of sellers of homes to communicate the information to the audience most interested in it, potential buyers.

In this case, not only does the regulation fulfill important state interests, there is also no realistic evidence that Consolidated Edison has been deprived of the cheapest means of communication. Consolidated Edison's argument (Jurisdictional Statement p. 29) that it has been foreclosed from the most economic means of disseminating its information rests upon the totally unjustified assumption that only out-of-pocket or incremental costs of producing bill inserts will be assigned to the utility's shareholders.[4] It assumes that utility ratepayers may properly be required to contribute the costs of postage, envelopes, assembling the computerized mailing lists and all other expenses associated with the billing process so that its management may use this ratepayer-financed facility to provide a free ride for the dissemination of its management's views. As we discuss *infra*, this Court has determined that persons are not entitled to a subsidy from others in order to express their views. This, was one of the important state interests sought to be achieved by the Commission in instituting its bill insert order.

C. The Regulation Fulfills Important State Interests.

The Commission's order achieves several important state interests all of which are ignored or misconstrued by Consolidated Edison in its Jurisdictional Statement (pp. 19-27).

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[4] In any event, Consolidated Edison is not constitutionally entitled to use the easiest and cheapest way to communicate. (*Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Adderley v. Florida*, 385 U.S. 39 (1966); *Kovacs v. Cooper*, 336 U.S. 77 (1949).)

The Commission's order relates to materials sent with utility bills. Consolidated Edison, of course, has the ability to bill most of the residents in its service area only because it is a franchised monopoly having the right to serve most of New York City and a portion of Westchester County. No other utility may legally offer service in competition with Consolidated Edison. One of the necessary adjuncts of providing utility service is the billing function which enables the utility to receive payment for services rendered. Since the billing process is a part of providing utility service, Consolidated Edison is legally entitled to receive rates designed to pay for it (New York State Public Service Law, § 66). Therefore, a portion of each ratepayer's utility rates pays for the cost of the billing. Consolidated Edison, however, used the billing process, paid for by the ratepayers (in January 1976), for a nonutility purpose—a vehicle to provide a free ride for inserts concerning its management's views on nuclear power.

Confronted with this background, the Commission raised several concerns which it believed required closing the billing packet to utility service related messages. A primary concern (Appellant's Appendix p. 43a, pp. 65a - 66a) was that the billing packet be used to provide information on utility service of aid to consumers, including energy conservation suggestions, safety tips and complaint procedures. The Commission relatedly concluded (Appellant's Appendix p. 43a) that it was unfair to the ratepayers who pay for the billing process to be forced to contribute to the dissemination of information not directly related to their utility service.

The Commission also expressed several other concerns. First, the billing packet is limited in capacity so that use for political issues might displace service-related information. If use of the packet for such purposes were allowed, it would require regulation in a manner analogous to the Federal Communications Commission's regulation of limited spectrum

space to assure that radio and television stations act as trustees of the public interest (Appellant's Appendix p. 66a). There, the FCC has acted both to preserve limited capacity and to assure that the airwaves are not used for only one-sided discussions of public issues. Similarly, the use of the billing process for controversial issues may create a public forum which would require opening the billing packet to opposing points of view (Appellant's Appendix pp. 66a - 67a). This would both aggravate the limited space problem and create enormous difficulties in administering the forum fairly. Second, if utility managements are able to use the billing process for mailing controversial inserts, the utilities will be receiving a free ride on the ratepayers who pay the embedded costs associated with the mailing (Appellant's Appendix p. 67a). Third, utility ratepayers are a captive audience who have no choice but to receive monthly bills (Appellant's Appendix p. 43a). Fourth, it would be impossible to make a meaningful cost allocation between shareholders and ratepayers that would eliminate the problem of providing a subsidy to utility management.

Consolidated Edison's Jurisdictional Statement totally fails to address the matters that provided the basis for the Commission's ban. The New York Court of Appeals took cognizance of these important state interests in determining that the Commission had jurisdiction over bill inserts (Appellant's Appendix pp. 6a - 7a), as well as when it determined that the Commission's ban did not abridge First Amendment rights (Appellant's Appendix, p. 10a). These interests were further discussed by the New York Supreme Court, Appellate Division Third Department in its decision upholding the bill insert order (Appellant's Appendix pp. 18a - 19a). The state interests were also carefully analyzed by Judge Pratt when he compared the Commission's ban on bill inserts to the ban on political advertising upheld by this Court in *Lehman, supra* (Appellee's Appendix pp. 34-40).

Consolidated Edison argues (Jurisdictional Statement pp. 19-23) that the regulation does not accomplish its purpose. Its argument, however, is premised upon either a misunderstand-

ing or a misconstruction of the order's intent. The order is not designed to protect "utility customers from receiving 'offensive' materials", from any source other than the utility billing process which should be limited to matters directly relating to utility service. Since the ban is not designed to prohibit the mailing of all "offensive materials", Consolidated Edison's argument that it does not accomplish this purpose is, of course, correct, but irrelevant. The Court of Appeals, of course, did not find that the Commission's ban would protect ratepayers from the receipt of offensive materials other than bill inserts. Similarly, the company's discussion concerning the authority of the government to regulate mail communication to shield persons from offensive views is also irrelevant to the case at hand. Consolidated Edison also argues that the ban is ineffective because it can mail the same materials to utility customers in a separate mailing that it is prohibited from mailing in the utility billing envelope. This argument only demonstrates that the Commission's ban does leave open ample alternative channels for communication. The Commission has done nothing to prohibit a utility company from expressing its views on controversial matters of public policy as long as it is not done by means of the ratepayer-financed billing mechanism.

Consolidated Edison also seeks to interject the question (Jurisdictional Statement pp. 23-27) of a conflict between First Amendment rights of entities to disseminate views by bill inserts and the privacy rights of unwilling recipients. However, this case does not raise that question at all. This case amounts to no more than a regulation of the utility billing process to assure that it is used for the purposes intended, namely, the billing of customers for utility service and the rendition of messages relating to useful consumer information. Utility customers are paying for the billing process

and it should be used only to serve them and for no other purpose. This is the basis of the Commission's bill insert ban recognized by both the New York Court of Appeals and Judge Pratt. This Court should not be misled by Consolidated Edison's irrelevant and erroneous contentions that the case presents novel issues concerning censorship of the mail.

D. The Order Assures That Ratepayers Are Not Forced To Subsidize The Views Of Utility Management In Violation Of This Court's Decisions.

One of the reasons for the Commission's bill insert regulation is to assure that utility customers are not forced, through their payments of monthly bills, to subsidize the dissemination of utility managements' views. Since ratepayers pay for the cost of the billing process as part of their monthly utility payments, they will also be paying for the postage, envelopes, etc. associated with the billing process which, absent the Commission's regulation, may be used by utility management for its own purposes and not just for matters directly relating to utility service. Consolidated Edison assumes (Jurisdictional Statement p. 29) that it is entitled to use the billing process while paying only for the incremental costs of producing the political bill insert to be enclosed with the mailing. If the Commission were to permit this, the utility management would clearly have a free ride on the ratepayers, since the bulk of the cost of the mailing process would be paid for through their forced contributions.[5]

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[5] Of course, varying cost allocations are possible. For example the Commission might direct that up to 50% of the costs of the billing process be allocated to the utilities' shareholders if the bill contained a political insert since the mailing was being used on a joint-use basis for both utility and nonutility purposes. If costs of this magnitude were assigned to management, the economy of using the billing process for advertising would be far different from that assumed by Consolidated Edison. For example, according to the evidence submitted by Consolidated Edison, an allocation of

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This Court has held that one cannot be compelled to contribute to the cost of publicizing another's views. For example, the Court found that union members may constitutionally prevent unions from spending a part of the members' required service fees to contribute to political candidates and express political views unrelated to their duties as exclusive bargaining representatives. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). As with the union members in *Abood*, Consolidated Edison's ratepayers will be compelled to subsidize the dissemination of political views unless the billing process is closed for those purposes.[6] *See also, Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Elrod v. Burns*, 427 U.S. 347 (1976). Similarly, the Court upheld the checkoff system for taxpayer contributions to presidential elections only after noting that "[t]he scheme involves no compulsion upon individuals to finance the dissemination of ideas with which they disagree. . . ." *Buckley v. Valeo*, 424 U.S. 1, 91, n 124 (1976).

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one-half of the postage cost in the case of a mailing would be over $175,000 for one first class mailing alone (Record below, p. 113). This would be far more expensive than running a message four times in local newspapers (Record below, p. 115).

It is not reasonable to assume, however, that the Commission can make a realistic cost allocation. The Commission specifically declined to do so (Appellant's Appendix p. 67a). Indeed, in light of the spacial limitations of the bill insert and the ability of utility management to pick and choose which messages are to be sent along with monthly bills, it would be impossible for the Commission to determine whether service-related messages had been deleted in order to open space for management's political messages.

[6] While a ratepayer's bill will not be higher if Consolidated Edison gets a free ride, the ratepayer will still be compelled to subsidize the billing process, a forced subsidy found impermissible in *Abood*.

The First Amendment, far from compelling the subsidization of other's views, prohibits forced contributions to political discussions. The Commission, therefore, not only failed to abridge Consolidated Edison's First Amendment rights, but it also acted to protect the rights of the company's ratepayers.

II. The Commission's Order Is Sufficiently Specific.

Consolidated Edison also argues (Jurisdictional Statement pp. 30-31) that the Commission's bill insert ban is unconstitutionally vague. This contention was rejected both by the New York Court of Appeals and by Judge Pratt of the Eastern District who set forth in detail (Appellee's Appendix pp. 26-31) the reasons for his rejection of that contention.

The standard in the Commission's order "controversial matters of public policy" is specific and provides guidance to utilities as to matters not to be enclosed in bill inserts. Thus far, the Commission has only had occasion to consider two issues with respect to its ban (Appellant's Appendix p. 68a); the current debate concerning the development of nuclear power and questions concerning the merits of public versus private ownership of electric utilities. In the more than two years since the Commission's ban has been in effect, there have been no problems concerning its implementation. The Commission's standard is in keeping with its longstanding Uniform System of Accounts which provides for allocation of political expenses to utility shareholders.[7]

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[7] Account 426.4 Expenditures for Certain Civic, Political and Related Activities, provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or

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In addition, the Commission's standard is virtually identical to that upheld by this Court in *Red Lion Broadcasting v. F.C.C.*, 395 U.S. 367, 395-396 (1969). In that case, the Court rejected a challenge to the Federal Communications Commission's fairness doctrine finding that the standard used by the FCC, "controversial issues of public importance," was not unconstitutionally vague. Furthermore, in *Abood, supra,* this Court noted (431 U.S. 240, n 41) that the union had adopted, as a corrective measure, an accounting procedure allowing a dissenting employee to protest the expenditure of his agency shop fee for " '. . . activities or causes of a political nature or involving controversial issues of public importance only incidentally related to wages, hours, and conditions of employment. . . .' " This Court expressed no concern with the standard adopted by the union.

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repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.

Conclusion

For the above reasons, this appeal should be dismissed or the decision of the New York Court of Appeals summarily affirmed.

Respectfully submitted,

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August 24, 1979

APPENDIX

Opinion Of The United States District Court, Eastern District of New York, Dated March 30, 1979 in *Long Island Lighting Company v. The New York State Public Service Commission*

V. *PSC's BAN ON CONTROVERSIAL BILL INSERTS*

A. *Factual Background.*

In order to publicize its belief that "nuclear generated power is the most economical, efficient and socially desirable method of meeting Long Island's need for increased energy", Plaintiff's memorandum at 22, LILCO has at times communicated its views about nuclear power to its customers through the use of bill inserts. LILCO believes that such inserts provide a significant medium for efficiently communicating with its customers at reasonable cost.

There is no claim that LILCO's bill inserts have been false or defamatory, nor is there any dispute that such communications on nuclear power are political in nature, that they must be paid for solely by LILCO shareholders, and that their out-of-pocket costs may not be considered an expense of doing business for rate making purposes.

PSC's ban on the use of such bill inserts had its origin in a complaint filed with PSC by the Natural Resources Defense Council, Inc. one of the intervenors in this case, which sought redress for a similar 1976 Con Edison bill insert that discussed the need for nuclear power development. After investigation and hearing, PSC determined that bill inserts should not be used to express the opinion of management on "controversial issues of public policy".

In the lengthy policy statement issued on February 25, 1977, PSC explained its reasoning. After summarizing its long-standing position that ratepayers should not bear the expense of advertising which states a utility's position on a matter of

public controversy, PSC concluded that such advertising would not be permitted to be included as a bill insert, even when the stockholder pays for it in full. PSC summarized its position as follows:

> Further, we shall not permit advertising on matters of public controversy to be included in the printed material that often accompanies the mailing of consumer bills. We believe that using bill inserts to proclaim a utility's view point on controversial issues (even when the stockholder pays for it in full) is tantamount to taking advantage of a captive audience, since the consumer cannot avoid receiving the literature with the utility's message. Regardless of whether consumers read the material, it is basically unfair to subject ratepayers who disagree with the utility's viewpoint to the arguments of the utility through its billing mechanism. A utility company's mailing list provides an available conduit for the easy dissemination of information, which should be used for the benefit of both the consumer and the company to convey noncontroversial and useful information that will create a better informed public. It should not become a vehicle for dissemination only of the company's views on controversial matters of public policy. Accordingly, we will not permit bill inserts to be used by utility companies for the purpose of advertising their opinions or viewpoints on controversial issues of public policy. 1977 Policy Statement at 10-11.

When PSC issued its order denying the petitions of various utilities for rehearing, it considered in greater detail the bill insert restriction in light of the utilities' first amendment contentions. It pointed out that it had not prohibited the companies from making their views known, that use of the bill insert to publicize a utility's views on matters of public controversy was in PSC's judgment improper "since it gives a utility a unique and undue advantage in publicizing its position" to a "selectively chosen target audience", that "the unique advantage * * * is then transformed into a device for

presenting only one side of this issue", and that this confers "an unreasonable advantage on management that unduly discriminates against others who may not share or who oppose the company's views". PSC Order Denying Rehearing, at 6 (July 14, 1977). PSC also focused on the limitations inherent in this "unique medium of communications". Its size and weight should not be so great as to require additional postage, and it can be mailed only once a month, and in many cases, only once every other month.

In PSC's view, bill inserts should be used "*primarily* to convey information that is clearly helpful to consumers" (emphasis supplied), and the prohibition is aimed at preserving that "public interest objective". Moreover, according to PSC, no one else can obtain the "wide captive audience for bill inserts" that is enjoyed by utilities having monopoly franchises conferred by the government. In its view, this aspect makes the utility bill insert medium analogous to the limited spectrum space available for radio and television broadcasting, a consideration that leads to problems of "fairness" and equal time so as to permit organizations with opposing viewpoints an opportunity to disseminate their opinions as inserts in the utility's bill. *Id.* at 7-8. After considering that approach, all PSC members were convinced ultimately "that it would be difficult to administer fairly, and would tend to lessen undesirably the number of bill inserts dealing directly with such useful and uncontroversial information as consumer conservation measures." *Id.* at 8. PSC also noted that the privilege to disseminate utility bill inserts derives from the privilege of franchise monopoly conferred by the government, and that it can, therefore, be regulated by the government to assure that it is exercised in the public interest.

Solely for the purpose of the summary judgment motion, LILCO has assumed certain facts to be established: (1) that LILCO derives an intangible benefit from the distribution of bill inserts discussing its views on controversial issues, although it contends that no consumer incurs any out-of-pocket expenses attributable to the bill insert program, and, (2) that alternative means of communication, such as newspaper advertising, are available at comparable cost, but that in management's opinion, such alternative means are not as effective a form of expression.[2]

PSC and intervenors argue that there is a factual dispute as to whether LILCO's customers (the ratepayers) are forced to subsidize political views with which they disagree, or in other words, whether all the costs of bill inserts containing political advertising can realistically be allocated between LILCO's ratepayers and shareholders. PSC claims that cost allocation is difficult for three reasons: first, since bill envelopes are limited in size LILCO would have less space to provide for information related to utility services or energy conservation tips if it provided more space for political messages; second, since the determination of rates is based on past expenses and anticipated increases, LILCO might prevent a loss of earnings stemming from cost allocation of political advertising, by simply spending less on customer service; finally, since rates are also set to insure profits for capital formation, a loss in LILCO's earnings due to cost allocation of political advertising expenses (including such advertising in bill inserts) could be made up by increasing electric rates in order to bring in sufficient income to raise the necessary capital. These arguments about cost allocation, however, are irrelevant to PSC's ban on controversial bill inserts, which was to apply "even when the stockholder pays for it in full." 1977 Policy Statement at 10.

Moreover, PSC has presented no facts to support its contention that, contrary to LILCO's position, costs cannot be allocated between ratepayers and shareholders. See *SEC v. Research Automation Corporation et al.*, 585 F2d 31, 33 (CA2 1978). Indeed, it seems inequitable for PSC to allege a factual dispute that is the result of its own admitted failure to formulate a cost allocation scheme for bill inserts. Nor have intervenors alleged facts to indicate that a fair cost allocation is impossible. On the other hand, LILCO's contention that cost allocation is feasible, is supported by facts. During a three month period in 1977, LILCO employees kept time sheets to determine the extent to which they were engaged in the bill insert process, LILCO's 9(g) Statement, Part B, ¶25; a list of hours and allocated salaries, as well as the cost of single sheet and more elaborate bill inserts discussing nuclear power, is also provided. LILCO 9(g) Statement, Part B, ¶¶25-26. From these it appears feasible for PSC to allocate the costs of a bill insert so that they may be attributed solely to LILCO's shareholders, and not to its ratepayers.

On the issue of whether bill insert costs can be apportioned, different methods of allocation are possible. One approach would be to charge the shareholders any additional costs of the inserts over and above the costs of mailing the bills to the ratepayers. Another would be just the reverse, that is to charge to the shareholders the full cost of mailing the inserts and envelopes and only incremental costs to the ratepayers for including the bills. A third would be to prorate the costs of the single mailing between the bill and the insert on a basis of space, number of words, or other reasonable manner. In any event, the problem is administrative, not constitutional.

Whatever allocation method might be used, however, to the extent that the cost of an insert is less than the cost of a

separate mailing of the same insert, it would represent a benefit or "free ride" to shareholders which had been paid for by ratepayers. Moreover, LILCO concedes that with any method of allocation there would be an intangible benefit from using bill inserts arising out of its access to a prepared mailing list and access to an existing bill stuffing and mailing system.

B. *Discussion.*

1. *LILCO and its advocacy of nuclear power are both entitled to some first amendment protection.*

In *First National Bank v. Bellotti, supra,* the Supreme Court ruled that corporate speech is entitled to first amendment protection, even when such speech deals with matters unrelated to the corporation's business interests. The thrust of the decision was that in the free discussion of governmental affairs, the nature of the speaker is not constitutionally significant and does not call into question different first amendment considerations. The Court noted that "[t]he inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source, whether corporation, association, union, or individual." *Id.*, 98 SCt at 1416.

LILCO argues that the purpose of its communications on nuclear power is to inform customers of the advantages of that form of energy and to reassure customers on management's judgment in pursuing the development of nuclear power. The bill inserts prohibited by PSC seek to discuss the merits of nuclear energy, a matter of current debate and divergent opinions. LILCO's proposed construction of nuclear power plants on Long Island is an issue seriously affecting both individual and community interests; since opponents of nuclear energy have campaigned against

the building of such facilities, the controversy has received substantial media attention. Even though LILCO may stand to gain commercially from completion of the nuclear plants, the information it seeks to disseminate is essentially political, and "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 US 64, 78 (1964).

It is clear, then, that debate on nuclear power is the type of speech the first amendment was designed to protect, see *Bellotti, supra*, 98 SCt at 1415, and that LILCO's interest in expressing itself on that issue is entitled to first amendment protection. It remains to be determined whether PSC's prohibition of bill inserts as a vehicle for LILCO's expression on a controversial issue such as nuclear power is an unconstitutional infringement of LILCO's first amendment rights of expression.

2. *PSC's ban is not unconstitutionally vague.*

LILCO argues that the ban on controversial issues of public policy in bill inserts is unconstitutional because it is vague. The court does not agree. LILCO contends that the alleged vagueness of the PSC ban raises three problems of constitutional dimension: (1) the ban fails to give adequate notice of the scope of its proscription; (2) the ban has a chilling effect on the exercise of first amendment rights; and (3) the ban vests overbroad discretion in PSC to regulate the content of proposed communications.[3]

Under PSC guidelines, a public utility's expenditures for political advertising are recorded in a special "below-the-line" account, number 426.4, which excludes them from consideration as business expenses in the rate making process, thus placing their burden on shareholders rather than ratepayers.[4]

PSC interprets this special cost-allocation account to include

> All advertising which seeks to sway opinion—legislative, environmental, governmental, consumer or any other kind—to the industry's position on public policy disputes.
>
> 1977 Policy Statement at 10.

PSC has also stated that it would "include in this category expenses incurred in the preparation of materials designed to influence public opinion in the current debate concerning the development of nuclear power." *Id.* The account has existed for some time; it has been the subject of various state court and regulatory decisions interpreting what is meant by "political advertising"; and LILCO has indicated that it will continue to cooperate with the PSC cost-allocation guidelines for Account 426.4. Therefore, since the "controversial issues of public policy" now barred by PSC from bill inserts are those matters whose expenses would ordinarily be recorded in Account 426.4 as political advertising, PSC argues that some guidance does exist for utilities to follow in determining whether or not a particular bill insert falls into the proscribed category.

In its decision denying reconsideration of the policy statement, PSC considered the vagueness argument directly:

> The petitioners * * * argue that the term "controversial issues of public policy" is too vague and does not give them any clear standards by which to judge the content of their bill inserts.
>
> In the [cost-allocation] Guidelines, we discussed the various types of materials that would fall within our proscription. These Guidelines are admittedly general but we expect to give them greater definition through

future advisory determinations. One such determination was made in our Policy Statement where we specifically included in this category expenses incurred in the preparation of materials designed to influence opinion in the current debate concerning the development of nuclear power. In its petition here, Con Edison requested a determination as to whether materials prepared in response to the demand by several elected officials for public operation of its facilities falls within the political category. We believe that it does and, therefore, should not be included as a bill insert. In the event a utility wishes additional guidance with respect to this matter, it should feel free to ask it. We will resolve any request expeditiously so that no undue delay will result.

Order Denying Petitions for Rehearing, *supra* at 8-9.

The Supreme Court has stated that:

> [A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
>
> *Connolly v. General Construction Company,* 269 US 385, 391 (1926).

In the context of the first amendment, the Court has further stated:

> We emphasize once again that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms ***"; "[f]or standards of permissible statutory vagueness are strict in the area of free expression. *** Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." ***

> When one must guess what conduct or utterance may lose him his position, one necessarily will "steer far wider of the unlawful zone ***." *** For "[t]he threat of sanctions may deter *** almost as potently as the actual application of sanctions."
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> *Keyishian v. Board of Regents,* 385 US 589, 603-04 (1967) (citations omitted).

The Supreme Court thus requires "more specificity of a statute potentially applicable to expression sheltered by the first amendment than in other contexts ***." Laurence H. Tribe, *American Constitutional Law* 719 (1978). In *Smith v. Goguen,* 415 US 566 (1974), where the Court invalidated as being unconstitutionally vague, a state provision punishing "contemptuous" treatment of the American flag, the Court noted that "[w]here a statute's literal scope *** is capable of reaching expression sheltered by the First Amendment, the [due process/vagueness] doctrine demands a greater degree of specificity than in other contexts." *Id.* at 573. See also *Grayned v. City of Rockford,* 408 US 104, 108-09 (1972); *Papachristou v. City of Jacksonville,* 405 US 156, 162 (1972); *Lanzetta v. New Jersey,* 306 US 451, 453 (1939).

Even under these high standards it does not appear that the PSC's exclusion of "controversial issues of public policy" from bill inserts is unconstitutionally vague. In context the phrase is synonym for the "political advertising" for which expenditures are recorded in Account 426.4. Interpretation of what is "controversial" or "non-controversial" may be governed by those considerations which determine expenditures recorded in that account. PSC has already had some expertise, and the public utilities some guidance, on what matters are considered "political" and thus subject to recording in Account 426.4; these interpretations may similarly be used as guidelines in determining what is or is not controversial".

LILCO also cites *First National Bank v. Bellotti, supra,* to support its vagueness argument. There the Supreme Court found unconstitutional a Massachusetts statute barring corporations from making expenditures designed to influence referenda on questions other than those "materially affecting" the property, business, or assets of the corporation. Justice Powell discussed the vague and deterrent effect of the statute's "materially affecting" standard:

> Even assuming that the rationale behind the materially affecting requirement itself were unobjectionable, the limitation in [the statute] would have an impermissibly restraining effect on protected speech. Much valuable information which a corporation might be able to provide would remain unpublished because corporate management would not be willing to risk the substantial criminal penalties—personal as well as corporate—provided for in [the statute]. *** As the facts in this case illustrate, management could never be sure whether a court would disagree with its judgment as to the effect upon the corporation's business of a particular referendum issue.

Id., 98 SCt at 1420, n. 21 (citations omitted).

LILCO argues that the "controversial issues of public policy" standard used in the PSC ban is even more subjective and amorphous than *Bellotti's* "materially affecting" standard. *Bellotti,* however, is readily distinguishable. The rejected standard of the Massachusetts statute had no prior history of interpretation or guidance from court or administrative opinions, whereas the language adopted by the PSC closely parallels the standard of political advertising attributable to Account 426.4, which does have a history of prior interpretation.

Moreover, as an administrative regulation the PSC restriction lacks the chilling impact of the potential jail sentence imposed by the Massachusetts statute. It even bears the promise of the PSC to "expeditiously" resolve in advance any doubt about a particular proposed bill insert. Although the delay caused by even an expeditious administrative review might under some circumstances chill speech sufficiently to render the regulation unconstitutional, that is not the case here, where the affected speech lacks spontaneity and is prepared for inclusion in the monthly billing envelope.

Thus, the ban is not unconstitutional on grounds of vagueness.

3. *PSC's ban does not otherwise infringe LILCO's first amendment rights.*

In its order denying rehearing, PSC stated:

> We have not, of course, prohibited the utilities from expressing their corporate opinions on controversial public policy issues in any other media. They are free, like all other members of our society, to explain their positions on radio and television interviews, to seek to purchase space in newspapers, and to speak before public gatherings. For these kinds of communications, we merely require that the companies, rather than their customers, bear the costs.

Order Denying Petitions for Rehearing, *supra* at 10.

Thus, PSC's order is not an absolute ban but rahter, a restriction on one method of communication, a distinction that the Supreme Court has stated "is not without significance to First Amendment analysis since laws regulating the time, place or manner of speech stand on a different footing than laws prohibiting speech altogether." *Linmark v. Township of Willingborough, supra,* 431 US at 93.

The Supreme Court has

> *** often approved [time, place, or manner restrictions] provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.
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> *Virginia State Board v. Virginia Citizens, supra,* 425 US at 771.

See also *Grayned v. City of Rockford, supra,* 408 US at 115-17; *Buckley v. Valeo,* 424 US 1, 17-18 (1976).

However, PSC's prohibition against using bill inserts to express management's views on "controversial issues of public policy" does not fit nicely into the category of a time, place, or manner restriction. As *Virginia State Board, supra* teaches, three tests must be met before speech may be restricted under that analysis. Two are clearly met here; but the analysis breaks down on the third.

One test that is clearly met here is the requirement of ample alternative channels for communication. As already indicated, PSC has not prohibited utilities from urging nuclear power or other positions of a controversial nature; it has merely deprived them of the bill insert means for expounding their views. All other means of communicating with the public—newspaper advertisements, public speakers, or even house-to-house canvassing—are unaffected by the bill insert ban. Although LILCO may feel that no other approach is as effective or efficient as would be the use of bill inserts, the fact remains, nevertheless, that for communicating its views LILCO has available to it ample alternative channels, indeed all those channels that are available to virtually anyone else in our society who wishes to impress the public with a point of

view. LILCO, in other words, is surely no worse off than other would-be communicators.

The second test which has been met here is that the restriction serve a significant governmental interest. PSC best summarized its justifications at pages 6 to 8 of its July 14, 1977 Order Denying Petitions for Rehearing. There, PSC expressed its belief that permitting utilities to use bill inserts to discuss controversial issues would confer an undue advantage on management, and would interfere with the primary function of bill inserts, namely, to convey information that is clearly helpful to consumers. The types of information that PSC viewed to be properly distributed at ratepayers' expense, and therefore presumably appropriately includable in bill inserts, were elsewhere described by PSC as including

> appeals for the conservation of gas or electricity; notification of emergency conditions and procedures; instructions in the proper use of the equipment which makes use of the utility's service; information about new rates, new billing practices, or new inspection or meter reading schedules; advice concerning hazards associated with the utility's service; reports on matters of interest to the public concerning the utility's service—such as service difficulties and progress in overcoming them, projections of new capacity additions, plans for new or improved means of providing service, and the like.
>
> 1977 Policy Statement at 11.

PSC viewed the inserts as directed to a wide captive audience that must open the bill and be exposed to the inserts. From this, PSC reasoned that a degree of fairness or equal time for proponents of opposing views would have to be required and that this, in turn, would not only be difficult to administer fairly, but also would tend to lessen undesirably

the number of bill inserts dealing with such useful and uncontroversial information as consumer conservation measures. These are significant governmental interests properly to be weighed by PSC in regulating utilities.

The third test for a valid time, place, or manner restriction, however, is missing here, for it cannot be said that PSC's ban on use of bill inserts to express views on "controversial issues of public policy" is unrelated to the content of the regulated speech. Indeed, it is precisely because of content—controversial issues—that LILCO has been denied access to bill inserts as a medium for advocating nuclear power. The discussion does not end, however, just because the content of LILCO's speech causes its regulation, or because the PSC ban does not fit the classic mold of a time, place, or manner restriction. A content based restriction was upheld by the Supreme Court in *Lehman v. City of Shaker Heights*, 418 US 298 (1974), in which the Court affirmed a judgment of the Supreme Court of Ohio, that held there was no violation of Lehman's first and fourteenth amendment rights when the city refused to permit the display on vehicles of the city transit system of posters advertising Lehman's candidacy for public office. The city had acted under a policy which permitted commercial advertising on its vehicles, but prohibited any "political advertising". Under that policy the city had not accepted or permitted any "political or public issue advertising." Lehman urged in the Supreme Court that the car cards constituted a "public forum" entitled to first amendment protection regardless of their primary purpose.

Four justices disagreed with Lehman, distinguishing the advertising in public transit vehicles "from the traditional settings where First Amendment values inalterably prevail." 418 US at 302. Writing for the prevailing four, Justice Blackmun

noted that American constitutional jurisprudence has been jealous to "preserve access to *public places* for purposes of free speech," but he nevertheless reminded us that "the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the Amendment to the speech in question." *Id.* at 302-03 (emphasis supplied). Then, stressing the difference between car card space as an incidental aspect of public transportation and free speech in open spaces, in a meeting hall, in a park, on a street corner, or in a public thoroughfare, he turned his attention to whether the city's policies and practices governing access to the transit system's advertising space were arbitrary, capricious or invidious. He found they were not, because potential revenues could be jeopardized by requiring short term political advertisements, because users would be subjected to the blare of political propaganda, because "there could be lurking doubts about favoritism," and because "sticky administrative problems might arise in parcelling out limited space to eager politicians." Under those circumstances, Justice Blackmun wrote, "the managerial decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation." *Id.* at 304.

Summarizing his view, Justice Blackmun concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity. In these circumstances, there is no First or Fourteenth Amendment violation.
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> *Id.* at 304.

Justice Douglas cast the "swing" vote when he concurred in the affirmance because he did not believe "that petitioner has any constitutional right to spread his message before his captive audience." *Id* at 309.

Writing for the four dissenting members of the court, Justice Brennan argued that Lehman's message was unquestionably protected by the first amendment, that by accepting commercial and public service advertising the city had voluntarily established a forum for communication, and that once a public forum has been established, discrimination based "*solely* upon subject matter or content" is prohibited. *Id.* at 316 (emphasis in original). Justice Brennan rejected the distinction between commercial and political advertising because "subject matter or content censorship in any form is forbidden", *id.* at 317, and he found it impossible to draw with accuracy either "the line between ideological and non-ideological speech" or a "manageable line between controversial and non-controversial messages." *Id.* at 319-20. Nor did he accept the avoidance of "lurking doubts about favoritism" as a justification for excluding political ads when commercial ads were permitted.

Lehman was a close case, perhaps because content restrictions are not favored by the courts. Contrary to LILCO's argument, however, they need not always be justified by state interests that are "compelling". *Lehman* shows that if there is no public forum, then reasonable governmental restrictions on speech may be sustained provided they are not arbitrary, capricious, or invidious. *Cf.* Tribe, *supra* at 692-93. Such restrictions were upheld in *Connecticut State Federation of Teachers v. Board of Education Members*, 538 F2d 471 (CA2 1976), where the court concluded that school mailboxes, bulletin boards and meeting rooms are not public fora

required to be made available to a minority union. And in *Buckel v. Prentice*, 410 F Supp 1242 (SD Ohio 1976) a school's distribution to parents, via students, of information concerning coming theatrical events, home safety measures and the like, did not establish the "child messengers" as a public forum for first amendment purposes. The court there found that dissemination of such material was a logical and proper extension of the educational function of schools and that it did not "give rise to any right of access to student distribution by parents or other concerned citizens." 410 F Supp at 1247.

Comparing *Lehman*, itself, with the present case we find many parallels and a few significant differences. In virtually all respects, however, PSC's position is stronger than was that of the City of Shaker Heights.

a. In both cases, there were ample alternate forums available to the speaker.

b. The government's restriction was against "political or public issue advertising" in *Lehman*, and against "controversial issues of public policy" here. Both are content based restrictions aimed at closing the medium to political or controversial messages. However, Justice Brennan's difficulty in finding a manageable line between controversial and non-controversial messages in *Lehman* may be resolved here through the existing interpretations on cost allocation and the expeditious review procedure promised by PSC.

c. In *Lehman*, the advertising space was owned and regulated by the city, but was offered generally to the public for commercial use. LILCO's mailing envelopes are, of course, owned by LILCO, but regulated by PSC. Historically, LILCO's bill inserts have been messages generated either by LILCO or by PSC, and have not been available for use by the general public at all.

d. Neither the advertising cards on Shaker Heights' busses nor LILCO's bill inserts constitute one of "the traditional settings" where, as Justice Blackmun observed, "First Amendment values inalterably prevail." 418 US at 302. As with the car cards, LILCO's bill inserts involve "no open spaces, no meeting hall, park, street corner, or other public thoroughfare."

e. LILCO is engaged in the commercial activity of providing gas and electric service to the public. Its primary obligation is to provide efficient, economical utility service to Long Island residents under a monopoly franchise that is regulated in the public interest by PSC. Charges for its services are summarized in bills that are mailed in envelopes. From time to time, additional messages to the energy consumer have been included in the bill envelope. At times PSC has required certain messages to be brought to the consumer's attention by that means, and at other times, LILCO has sought to communicate with its consumers directly through the bill inserts. Clearly, what may be included in the billing envelopes is incidental to the basic service functions of both LILCO and PSC, just as providing car card space was incidental to Shaker Heights' function of providing public transportation.

f. In *Lehman*, a major point of difference between Justices Blackmun and Brennan was the former's view that the car cards were not a public forum, and the latter's conclusion that the city's own actions had turned the car cards into a public forum. PSC here, by this very regulation, is helping to prevent the bill inserts from becoming a public forum that would subject them to the strict scrutiny necessary for constitutional operation.

g. Shaker Heights' justifications for prohibiting political or public issue messages on its car cards were that the limitation on access to the advertising space would minimize (1) chances of abuse, (2) the appearance of favoritism, and (3) the risk of imposing upon a captive audience. All were accepted by Justice Blackmun as reasonable legislative objectives. Essentially similar justifications have been offered by PSC for keeping controversial issues of public policy out of utilities' bill inserts: (1) the risk of imposing on a captive audience, (2) the appearance of favoritism toward utilities' views on controversial issues, (3) the difficulties inherent in counteracting that appearance by permitting other points of view, and (4) the inevitable charges of improper conduct when PSC is placed in the position of an arbiter of fairness on controversial views, many of which may be far removed from matters of utility management and regulation.

In addition to the foregoing, however, PSC has two more justifications to add to its side of the balance. It seeks to protect the bill insert medium from over-use so that it may be preserved for important and useful information which PSC deems necessary for the consumer to use the utilities' services efficiently, economically and safely. In addition, PSC clearly seeks to avoid making a "public forum" out of the bill inserts, and thereby to steer clear of the issue that so sharply divided the Court in *Lehman*. As the Supreme Court found in *Police Department of Chicago v. Moseley*, 408 US 92, 96, 92 SCt 2286, 2290 (1972), "once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." Since substantial constitutional and administrative consequences would flow from a deter-

mination that a particular medium of communication qualified as a "public forum", surely PSC may limit use of the billing mechanism so that it does not become such a forum. In this way PSC could avoid being enmeshed in a wide variety of issues and considerations that are not directly related either to the regulatory responsibilities of PSC or to the business of the utilities it regulates.

In short, on this issue, the Supreme Court in *Lehman* upheld against a first amendment challenge a governmental prohibition against "political and public issue advertising" on rapid transit vehicles. *A fortiori*, PSC's ban of "controversial issues of public policy" from the bill inserts of New York's public utilities does not infringe the first amendment.

FOOTNOTES

[2] PSC disputes LILCO's contention that bill inserts are an effective means of communication compared to other methods, but LILCO has acceded to PSC's view for purposes of this motion, so there is no dispute as to this fact. It should be noted, however, that LILCO's position on the relative cost efficiency of bill inserts, compared with other forms of communication to the public, is supported by a PSC ruling that required utilities to use bill inserts to notify customers of prospective rate changes:

> While other methods of notification of rate filings are required by statute and the Commission's rules, the narrative description under discussion should be easier to read and understand and would be provided to all customers directly. *We believe that the bill insert requirement we have proposed should effect a significant improvement in notice to the public at minor cost.*
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> Petition of Consumer Protection Board, NYS Public Service Commission, Case 26972, at 5-6 (Aug. 10, 1976) (emph. supp.).

Prior to this ruling, utilities were required to use newspaper advertisements to notify customers of proposed rate changes and hearings on such changes. Thus, despite its argument to the contrary in this case, PSC itself has recognized bill inserts as an efficient means of communication.

[3] Extending these contentions, LILCO urges that since the PSC ban "applies only to inserts which discuss 'controversial matters of public policy' and explicitly authorizes 'non-controversial' and 'useful' inserts, [LILCO] is unable to determine whether many inserts fall into the proscribed or encouraged category." Aff. of Ira L. Freilicher, ¶ 13. As an example, LILCO refers to a bill insert discussing the federal food stamp program which had been disseminated prior to the PSC ban. LILCO argues that the food stamp program has been the subject of some controversy, and that under the present PSC ban, it would be impossible to determine whether a food stamp insert would now be deemed "controversial" or "useful". See Freilicher aff., ¶¶ 14-15. As a result, LILCO claims that it would be reluctant to disseminate bill inserts on that topic in the future.

FOOTNOTES

[4] The account description provides:

> This account shall include expenditures for the purpose of influencing public opinion with respect to the election or appointment of public officials, referenda, legislation or ordinances (either with respect to the possible adoption of new referenda, legislation or ordinances or repeal or modification of existing referenda, legislation or ordinances) or approval, modification or revocation of franchises; or for the purpose of influencing the decisions of public officials or advancing the political objective of the utility, but shall not include such expenditures which are directly related to appearances before regulatory or other governmental bodies in connection with the reporting utility's existing or proposed operations.
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> Account 426.4, Expenditures for Certain Civic, Political and Related Activities. 16 NYCRR, Ch. III, Sub. Ch. F.